No. 12975

United States
Court of Appeals
For the Ninth Circuit.

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS, a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Northern District of California,
Southern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHNSON, HARMON & HENDERSON,
J. EDWARD JOHNSON,
703 Market St., San Francisco, Calif.
Attorneys for Appellant.

HADSELL, MURMAN & BISHOP,
SYDNEY P. MURMAN,
RICHARD S. BISHOP,
405 Montgomery St., San Francisco, Calif.
Attorneys for Appellee.

In the United States District Court, in and for the Northern District of California, Southern Division

No. 29078R

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation, FIRST DOE, SECOND DOE,

Defendants.

PETITION FOR REMOVAL TO THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

To the District Court of the United States, for the Northern District of California, Southern Division

The petition of Corning Glass Works, a corporation, respectfully shows:

I.

An action has been brought in the Superior Court of the State of California, in and for the City and County of San Francisco, between the plaintiff and defendants above named, being action No. 389272 in said court, and said action is now pending in said court and has not been brought to trial therein; that the date of the commencement of said action

was the 4th day of August, 1949; that the date on which this defendant was served with the Summons and Complaint in said action was the 4th day of August, 1949; that to the knowledge of this defendant there is no other defendant who has appeared, or who has been served with Summons and Complaint, or who is a necessary, or proper, party defendant to said action.

II.

That said action is of a civil nature at law and is brought to recover damages for personal injuries, and is one of which the District Courts of the United States are given original jurisdiction.

III.

That the matter, or amount, in dispute in said suit exceeds the sum, or value, of Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

IV.

That the controversy in said suit is between citizens of different states in that your petitioner, Corning Glass Works, a corporation, was at the time of the commencement of this action, and still is, a corporation created, organized and existing under and by virtue of the laws of the State of New York, and was then, and still is, a resident and citizen of said State of New York and not a resident or citizen of the State of California, whereas the plaintiff was at the time of the commencement of this action, and still is, a resident and citizen of the State of California, and more

particularly a resident and citizen of the City of Berkeley, County of Alameda, State of California.

V.

Your petitioner presents herewith a bond, conditioned and in all respects conforming to the requirements of Section 1446(d) of the United States Code—Judiciary and Judicial Procedure.

VI.

That a copy of the Summons and Complaint which were served on this defendant in said action are annexed hereto; that said Summons and Complaint are the only papers, process, pleadings, or orders, which have been served on this defendant in said action to the date hereof.

Wherefore, petitioner prays that the above-entitled action be removed from the Superior Court of the State of California, in and for the City and County of San Francisco, to the District Court of the United States for the Northern District of California, Southern Division.

HADSELL, SWEET, INGALLS & MURMAN,

/s/ SYDNEY P. MURMAN,

/s/ RICHARD S. BISHOP,

Attorneys for Defendant Corning Glass Works, a Corporation.

State of California,
City and County of San Francisco—ss.

Sydney P. Murman, being duly sworn, deposes and says:

That he is an attorney at law and a member of the law firm of Hadsell, Sweet, Ingalls & Murman, attorneys for the Corning Glass Works, a corporation, defendant in the above-entitled action; that he makes this verification for and on behalf of said defendant for the reason that said defendant is a corporation having its principal place of business in the State of New York and there is no officer, or other person, authorized to make this verification in the City and County of San Francisco, where affiant and said attorneys have their office; that he has read the foregoing Petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein set forth upon information or belief and, as to those matters, he believes it to be true.

/s/ SYDNEY P. MURMAN.

Subscribed and sworn to before me this 18th day of August, 1949.

[Seal]: /s/ HAZEL E. THOMPSON,
Notary Public, in and for the City and County of San Francisco, State of California.

In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 389272

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation, FIRST DOE, SECOND DOE,

Defendants.

COMPLAINT FOR DAMAGES FOR PERSONAL INJURIES

The plaintiff complains of the defendants and for cause of action alleges:

I.

That the defendant Corning Glass Works at all times mentioned herein was and now is a corporation organized and existing under and by virtue of the laws of the State of New York; that defendants First Doe and Second Doe are fictitious names of defendants whose true names plaintiff is ignorant of and plaintiff prays that when said true names are known, this complaint may be amended to allege the same; that at all times herein mentioned defendants were and now are doing and transacting business in the State of California; that defendants at all times mentioned herein were engaged in the business of manufacturing and selling a certain brand and type of glass cooking utensils

known generally as Pyrex Ovenware; that said cooking utensils are designed for use by the public in general as dishes for cooking and serving foods generally and were sold by defendants to dealers and stores generally for ultimate sale to the public in general for said uses; that defendants at all times herein mentioned did so distribute and sell its said ovenware to retail stores and dealers throughout the State of California generally.

II.

That on or about the 18th day of December, 1948, the plaintiff purchased a said Pyrex cooking utensil manufactured and sold by defendants for ultimate purchase and use by the public as foresaid to wit, a Pyrex baking dish at a retail dealer of the same; that thereafter and on or about December 23, 1948, plaintiff commenced to wash said dish preparatory to using the same; that while plaintiff was washing said dish, the dish exploded and broke to pieces suddendly without any warning whatsoever, and plaintiff was thereby struck and cut by pieces of said broken dish and received injuries to her said right forearm, as follows, to wit: a deep, slightly oblique transverse laceration of the right forearm, a complete laceration of all the flexor tendons of the wrist, a severance of the radial and ulna arteries and severance of the ulna and median nerves; that by reason of said injuries it was necessary to preform a surgical operation upon plaintiff to tie the radial and ulna arteries, remove the hemostats and attempt repair of the median and ulna nerves, attempt repair of the tensor and the

tendons of the second, third and fifth fingers, and attempt to repair and care for said injuries generally; that since and by reason of said injuries the plaintiff's right hand has been at all times and now is rendered useless and without any function; that by reason of said injuries there is a flexion deformity of the fingers of the said right hand, so that the same are held in a most deformed position at all times; that plaintiff is informed and believes and therefore alleges the fact to be that the said injury to her right arm is permanent and that she will suffer for the rest of her life the lack of use and utility and deformity of her right arm, as aforesaid; that by reason of said injuries plaintiff suffered a severe shock to her nervous system; that by reason of the alleged injuries caused by the explosion and breaking of said dish as herein alleged, the plaintiff has suffered permanent injuries and disfigurement to her arm and to her health in general, and has been caused shock, pain and suffering as aforesaid, and has suffered mortification, embarrassment and humiliation and pain and will so suffer for the rest of her life, all to her damage in the amount of $100,000.00.

III.

That by reason of said injuries caused by the breaking and exploding of said Pyrex dish as aforesaid it was necessary that plaintiff have medical aid and attention and hospitalization to perform the operation upon her above mentioned, and to otherwise attempt to allevoate her suffering and affect

a cure of her injuries; that by reason of said injuries plaintiff has incurred medical expenses and hospital expenses in the amount of approximately $1,000.00; that plaintiff is informed and believes and therefore alleges the fact to be that by reason of said injuries it will be necessary to incur additional medical expenses for medical care, nursing and medical treatment of said injuries in addition to those already incurred; that plaintiff does not know the amount of same and plaintiff prays that when the amount of said additional expenses are known to her, that this complaint may be amended to allege the same.

IV.

That the explosion and breaking of said Pyrex dish resulting in the injuries to plaintiff, as aforesaid, was proximately caused by the negligence of the defendants as follows, to wit: That the defendants did negligently and carelessly manufacture and construct said dish which exploded and caused said injuries in an unsafe and unsubstantial manner so that when said dish was delivered to a retail dealer for the ultimate sale to the public in general, and when purchased and used and handled by plaintiff, as aforesaid, it was in such a condition that it constituted an inherently and abnormally dangerous article to those using it normally for the purpose for which it was intended; that it was so negligently constructed that it would, when used for the purpose for which it was intended, explode and break, inflicting injury on those so handling it; that said dish did explode and break while being

handled and used by plaintiff as aforesaid, normally and for the purpose for which it was intended, causing the injury to plaintiff aforementioned; that said dish had not been changed in any respect after it had left the defendants possession prior to its exploding and breaking causing the injury to plaintiff above mentioned.

Wherefore plaintiff prays for judgment against defendants and each of them in the sum of $101,000.00, plus such medical expenses as may be reasonably required for medical care and attention in the future, for costs of suit and for such other and further relief as to the Court may seem proper in the premises.

/s/ JOHNSON, HARMON & HENDERSON.

State of California,
City and County of San Francisco—ss.

Lula J. Wilson, being first duly sworn, deposes and says:

That she is the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof and that the same is true of her own knowledge except as to those matters which are therein stated upon information and belief and as to those matters that she believes it to be true.

/s/ LULA J. WILSON.

Subscribed and sworn to before me this 3rd day of August, 1949.

[Seal] PROVIDENCE WARNE,

Notary Public in and for the City and County of San Francisco, State of California.

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 389272

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation, FIRST DOE, SECOND DOE,

Defendants.

Action brought in the Superior Court of the State of California in and for the City and County of San Francisco, and the complaint filed in the office of the County Clerk of said City and County.

JOHNSON, HARMON & HENDERSON,
Attorney for Plaintiff.

SUMMONS

The People of the State of California Send Greeting to:

Corning Glass Works, a corporation, defendant.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above,

brought against you in the Superior Court of the State of California, in and for the City and County of San Francisco, within ten days after the service on you of this summons—if served within this City and County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the City and County of San Francisco, State of California.

Dated Aug. 4, 1949.

[Seal] MARTIN MONGAN,

By D. T. WOOD,
Deputy Clerk.

[Endorsed]: Filed August 18, 1949.

[Title of District Court and Cause.]

NOTICE OF REMOVAL OF ACTION TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

To the Plaintiff Above Named and to Messrs. Johnson, Harmon & Henderson, Attorneys for said Plaintiff

You, and Each of You, Will Please Take Notice that, on the 18th day of August, 1949, the defendant, Corning Glass Works, a corporation, did file in the District Court of the United States for the Northern District of California, Southern Division, and in the office of the Clerk thereof, its Petition and bond for the removal of that certain action in the Superior Court of the State of California, in and for the City and County of San Francisco, between the plaintiff and defendants above-named, being action number 389272 in said court, from the said Superior Court of the State of California, in and for the City and County of San Francisco, to the District Court of the United States for the Northern District of California, Southern Division.

Copies of said Petition and bond are herewith served upon you.

Dated this 18th day of August, 1949.

HADSELL, SWEET, INGALLS & MURMAN,

/s/ SYDNEY P. MURMAN,

/s/ RICHARD S. BISHOP,

Attorneys for Defendant, Corning Glass Works, a Corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT CORNING GLASS WORKS, A CORPORATION

The defendant Corning Glass Works, a corporation, answers plaintiff's complaint as follows:

I.

Defendant admits that at all times herein mentioned it was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, now doing and transacting business in the State of California, and engaged in the business of manufacturing and selling a certain brand and type of glass cooking utensils known generally as Pyrex Ovenware which are distributed and sold throughout the State of California generally.

II.

Except as hereinabove admitted, defendant avers that it has no information or belief as to the allegations of Paragraph I to enable it to answer the allegations therein contained and, placing its denials on that ground, defendant denies each and every part of said allegations.

III.

Answering paragraph II defendant denies generally and specifically the allegation "that while plaintiff was washing said dish, the dish exploded and broke to pieces suddenly without any warning whatsoever, and plaintiff was thereby struck and

cut by pieces of said broken dish"; that as to the remaining portions of said Paragraph II defendant avers that it has no information or belief as to the allegations therein contained to enable it to answer the same and, placing its denials on that ground, defendant denies each and every part of said allegations.

IV.

Answering Paragraph III defendant denies generally and specifically the allegation that plaintiff's injuries were "caused by the breaking and exploding of said Pyrex dish as aforesaid"; that as to the remaining portions of said Paragraph III defendant avers that it has no information or belief as to the allegations therein contained to enable it to answer the same, placing its denials on that ground, defendant denies each and every part of said allegations.

V.

Answering Paragraph IV defendant denies each and every, all and singular, the allegations in said paragraph contained; denies that defendant was careless and negligent, or careless, or negligent, in any respect whatsoever; denies that plaintiff has been damaged in the sum of One Hundred and One Thousand ($101,000.00) Dollars, or any part thereof, or in any other sum.

And as a Further, Separate and Distinct Answer and Defense, Defendant Alleges:

That the plaintiff, herself, did not exercise ordinary care, caution, or prudence in the premises to avoid said accident and the resulting injuries, if

any, by her sustained, and that said accident and the resulting injuries, if any, complained of, were directly and proximately contributed to and caused by the fault, carelessness and negligence of plaintiff in the premises.

Wherefore, defendant prays to be hence dismissed with its costs of suit incurred herein.

HADSELL, SWEET, INGALLS & MURMAN,

/s/ SYDNEY P. MURMAN,

/s/ RICHARD S. BISHOP,

Attorneys for Defendant Corning Glass Works, a corporation.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1949.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Above-Named Defendants and Hadsell, Sweet, Ingalls & Murman, Sydney P. Murman, and Richard S. Bishop, their attorneys:

Notice is hereby given that on the 12th day of September, 1949, at 10:00 o'clock a.m. of that day or as soon thereafter as counsel can be heard in the court room of the Honorable Michael J. Roche, Room 338, Post Office Building, 7th and Mission Streets, City and County of San Francisco, plain-

tiff, by her attorneys, Johnson, Harmon & Henderson, will apply for an order remanding the above-entitled cause to the Superior Court of the State of California, in and for the City and County of San Francisco, from which court it was removed.

There is served herewith upon you a copy of the motion which will be presented to the court at the time aforesaid and a copy of affidavit in support of said motion.

Dated this 29th day of August, 1949.

JOHNSON, HARMON & HENDERSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1949.

[Title of District Court and Cause.]

MOTION TO REMAND

Now comes plaintiff by her attorneys, Johnson, Harmon & Henderson, and upon the basis of the facts alleged in the accompanying affidavit and the file and record herein moves this court to remand this cause to the Superior Court of the State of California in and for the City and County of San Francisco from which it was attempted to be removed to this court for the reason that the petition

to remove said action to this court was not filed in time.

Dated this 29th day of August, 1949.

JOHNSON, HARMON & HENDERSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION TO REMAND

State of California,
City and County of San Francisco—ss.

J. Edward Johnson, being duly sworn, deposes and says:

That he is one of the attorneys for plaintiff and is conversant with the facts relating to the above-entitled action; that said action was originally filed in the Superior Court of the State of California as action No. 389,272 on the 4th day of August, 1949; that summons was on that day duly issued; that defendant Corning Glass Works was on the 4th day of August, 1949, personally served with summons and a copy of the complaint in the City and County of San Francisco, all in accordance with the law of the State of California; that the time for answering or otherwise pleading in re-

sponse to said complaint and summons expired on August 15, 1949.

That the petition to remove this cause to this court was not filed herein until the 18th day of August, 1949; that a stipulation was entered into between counsel for plaintiff and counsel for defendant on August 15, 1949, in words and figures as follows, to wit:

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 389272

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, et al.,

Defendant.

STIPULATION EXTENDING TIME

It is hereby stipulated by and between the respective parties hereto that the defendant Corning Glass Works, a corporation may have to and including the 25th day of August, 1949, within which to plead, answer, demur or otherwise move.

This stipulation need not be filed.

Dated August 15th, 1949.

JOHNSON, HARMON & HENDERSON,
Attorneys for Plaintiff.

That defendant's petition for removal to this court was not filed until August 18, 1949, and that plaintiff's counsel was not served with notice thereof until August 19, 1949.

/s/ J. EDWARD JOHNSON.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ PROVIDENCE WARNE,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires May 26, 1953.

Receipt of copy acknowledged.

[Endorsed]: Filed August 30, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION TO REMAND

State of California,
City and County of San Francisco—ss.

Richard S. Bishop, being duly sworn, deposes and says:

That he is one of the attorneys for the defendant Corning Glass Works, a corporation, and is familiar with the facts relating to the above-entitled action; that the defendant Corning Glass Works was, personally, served with summons and a copy of the com-

plaint in said action in the City and County of San Francisco, on the 4th day of August, 1949; that the Petition to Remove this cause to this court, together with a bond, in the form required by law, were filed in this court on the 18th day of August, 1949; that on the 18th day of August, 1949, a copy of the said Petition for Removal was filed with the Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, which was the court in which said action was originally filed; that on the 19th day of August, 1949, the attorneys for plaintiff were served with written notice of the filing of said petition and bond, and on the said 19th day of August, 1949, the attorneys for plaintiff were also served with copies of the said petition and bond; that the removal of this action to the above court was therefore completed within the twenty (20) day period allowed by Section 1446 of the New United States Judicial Code.

Wherefore, affiant prays that the plaintiff's Motion to Remand be denied.

/s/ RICHARD S. BISHOP.

Subscribed and Sworn to before me this 6th day of September, 1949.

[Seal] /s/ HAZEL E. THOMPSON.
Notary Public, in and for the City and County of San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed September 7, 1949.

[Title of District Court and Cause.]

NOTICE

To Messrs. Johnson, Harmon & Henderson, 1400 Central Tower, 703 Market St., San Francisco 3, Calif., and

Messrs. Hadsell, Sweet, Ingals & Murman, 614 The San Francisco Bank Bldg., 405 Montgomery St., San Francisco 4, Calif.

You Are Hereby Notified that on Oct. 3, 1949, the above-entitled case will appear on the Law and Motion calendar of Judge Michael J. Roche to be set for trial.

Sept. 26, 1949.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

MOTION REQUESTING TRIAL BY JURY

To defendant, Corning Glass Works, and to its attorneys, Messrs. Hadsell, Sweet, Ingalls & Murman and Sydney P. Murman and Richard S. Bishop:

You and Each of You please take notice that at the time this matter comes on to be set for trial, on Monday, the 3rd day of October, 1949, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, in the above court, at the Courtroom, Post Office Building, 7th and Mission Streets, San Francisco,

California, the plaintiff will move this court for its order to order a trial by jury in the above matter. Said motion will be made upon affidavit of J. Edward Johnson, filed herein and upon all the records and files in the above matter.

Dated: September 28, 1949.

JOHNSON, HARMON & HENDERSON,
Attorneys for Plaintiff.

Points and Authorities

Rules 38 and 39, Federal Rules of Civil Procedure. See discussion William Goldman Theatres v. Kirkpatrick, 154 F.(2) 66.

JOHNSON, HARMON & HENDERSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1949.

[Title of District Court and Cause.]

AFFIDAVIT IN SUPPORT OF MOTION REQUESTING TRIAL BY JURY

State of California,
City and County of San Francisco—ss.

J. Edward Johnson, being first duly sworn, deposes and says that he is one of the attorneys for

plaintiff in the above matter; that he has had the actual management of this cause from the time the complaint was filed in the Superior Court of the State of California, in and for the City and County of San Francisco.

That it has been the desire and expectation of the plaintiff from the time she first discussed this matter with affiant that this cause should be tried before a jury; that that has been the intention of plaintiff's counsel throughout; that affiant neglected to ask for a jury within the time prescribed by the Federal Rules of Civil Procedure, that is to say, within ten days after the service of the last pleading, which in this case was the answer of the defendant.

That said pleading was served on affiant as plaintiff's attorney on or about August 24, 1949, at which time there was pending before this court a motion to remand this cause to the Superior Court of California, in and for the City and County of San Francisco. That at the time said pleading and answer was filed and served on affiant as said counsel, affiant was of the view that this court would have no alternative but to remand this cause to the state court; that affiant inadvertently followed the rule of said state court which permits a party to request a jury trial when he files a memorandum to set a case for trial, or when the cause is set for trial. That failure to request a jury herein within the time allowed by Rule 38 of the Federal Rules of Civil Procedure was due to the inadvertence and mistake of affiant as plaintiff's counsel. That this action is a cause in damages and one at law, which, as a matter of con-

stitutional law, entitles the parties to a jury trial if they desire it.

Wherefore affiant for and in behalf of and as counsel for plaintiff respectfully requests this court to make an order directing that this cause be tried before a jury, all as authorized by Rule 39 of the Federal Rules of Civil Procedure.

/s/ J. EDWARD JOHNSON.

Subscribed and sworn to before me this 28th day of September, 1949.

[Seal] /s/ PROVIDENCE WARNE,
Notary Public, in and for the City and County of San Francisco, State of California.

My Commission Expires May 26, 1948.

Receipt of copy acknowledged.

[Endorsed]: Filed September 28, 1949.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco on Monday,

the 10th day of October, in the year of our Lord one thousand nine hundred and forty-nine.

Present: the Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case came on regularly this day to be set for trial and for hearing on motion for jury trial. After hearing the arguments of the attorneys, it is Ordered that the motion for jury trial be denied and that trial be set for January 24, 1950.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 24th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

This case came on regularly this day for trial. Ordered that said case be assigned to Judge Herbert W. Erskine for trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 24th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

This case came on regularly this day for trial before the Court sitting without a jury. Messrs. W. G. Harmon and William H. Henderson appeared for and on behalf of the plaintiff. Sidney P. Murman, Esq., appeared for and on behalf of the defendant. After opening statements by Messrs. Harmon and Murman on behalf of their respective clients, Lula J. Wilson, Herman Winkler, Wm. Curtis, Ernest R. Taylor, Robert L. Wilson, and Henry L. Rhodes were sworn and testified on behalf of the plaintiff. Mr. Harmon introduced in evidence and filed Plaintiff's Exhibits Nos. 1, 3, and 4, and introduced Plaintiff's Exhibit No. 2, which was received and marked for identification only. Mr. Murman introduced Defendant's Exhibit A, which was received and marked for identification only. Thereupon, the hour of adjournment having arrived, it is Ordered that this case be continued to January 25, 1950, for further trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof. in the City and County of San Francisco, on Wednesday, the 25th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the further trial of this case was resumed. Arthur Holstein was sworn and testified on behalf of the plaintiff. Thereupon the plaintiff rested. Mr. Murman, on behalf of the defendant, made a motion for judgment of dismissal, ruling upon which motion was Ordered reserved. Mr. Murman introduced in evidence and filed Defendant's Exhibit A which was previously received and marked for identification only, and introduced Defendant's Exhibit B which was received and marked for identification only. Thereupon, the hour of adjournment having arrived, it is Ordered that this case be continued to January 26, 1950, for further trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 26th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the further trial of this case was resumed. The Court Ordered that the motion of defendant for involuntary dismissal be and the same is hereby denied. Henry G. Mankin and Joseph A. Pask were sworn and testified on behalf of the defendant. Mr. Murman read into evidence the deposition of William G. McClellan on behalf of the defendant. Thereupon, the hour of adjournment having arrived, it is Ordered that this case be continued to January 27, 1950, at 10:00 a.m., for further trial.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 27th day of January, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

The parties hereto being present as heretofore, the further trial of this case was resumed. Thereupon the defendant rested. Henry L. Rhodes was recalled by the plaintiff for further evidence in rebuttal. Both sides rested. Mr. Murman made a motion for judgment of involuntary dismissal, which motion was Ordered taken under submission. Thereupon the Court Ordered that this case be and the same is hereby submitted.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tues-

day, the 14th day of February, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

On the request of counsel for the plaintiff, it is Ordered that this cause be reopened for the filing of briefs and placed on the calendar for March 6, 1950, for submission.

[Title of District Court and Cause.]

ORDER FOR FILING POINTS AND AUTHORITIES

Good Cause Appearing Therefor, It Is Hereby Ordered that the above case is reopened for the submission of points and authorities. The plaintiff may have to and including the 15th day of February, 1950, within which to submit opening memorandum of points and authorities, defendant may have to and including February 20, 1950, within which to submit answering memorandum and plaintiff may have to and including February 24, 1950, within which to file a reply thereto and that the case may be placed on the calendar for resubmission on the 6th day of March, 1950.

Dated: February 14th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed February 14, 1950.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 6th day of March, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

This case came on regularly this day for submission. On motion of M. J. Murray, Esq., attorney for defendant, and with the consent of W. G. Harmon, Esq., attorney for plaintiff, it appearing that all briefs have been filed herein, it is Ordered that this case stand submitted.

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 19th day of September, in the year of our Lord one thousand nine hundred and fifty.

Present: the Honorable Herbert W. Erskine,
District Judge.

[Title of Cause.]

This case heretofore having been tried by and submitted to the Court for consideration and decision, now, due consideration having been had, it is Ordered that judgment be entered herein in favor of the defendant and against the plaintiff upon the presentation of findings and judgment by counsel for defendant, in accordance with an opinion this day signed and filed.

In the District Court of the United States for the Northern District of California, Southern Division

No. 29078

LULA J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation, FIRST DOE, SECOND DOE,

Defendants.

Erskine, District Judge.

MEMORANDUM OPINION

Statement of Facts

This is an action for damages for personal injuries sustained by plaintiff by reason of the breaking of a Pyrex bowl manufactured by defendant corporation. Jurisdiction in this Court is based upon diversity of citizenship, plaintiff being a resident of California and defendant corporation a resident of New York.

The bowl in question consisted of Pyrex ware, a glass product, designed and manufactured by defendant to withstand considerable temperature. It is commonly known as "ovenware" and is used for baking. The evidence shows that subsequent to its manufacture the bowl was placed in a carton, which was packed in a box containing several separate cartons, and that this box was shipped by train to a jobber in San Francisco. It was purchased by the

jobber F.O.B. New York. Upon reaching its destination the box was unloaded into a truck, and then taken to the jobber's warehouse where it was unloaded. Thereafter, it was reloaded on a truck, delivered to the Emporium-Capwell Company store in Oakland, California, unloaded and put in a storeroom. Subsequently the box was opened and the contents placed upon the store shelves for sale. There is no evidence that during these many handlings the bowl or dish did not sustain some shock or bump which might have caused a defect, with the exception of the testimony of a jobber, who often sold this ware to the store, that if a carton box had been damaged in transit it would be inspected by him and any damaged contents removed; the testimony of the person in charge of the department which handled the ware to the same effect; and the testimony of the plaintiff and her husband that they made a visual inspection when they brought the bowl into their home and found no visible defects. Neither the jobber nor the representative of Emporium-Capwell could say anything about this particular piece of Pyrex ware. Their testimony merely went to their method of handling the ware from manufacturer to consumer. The jobber could not say that he was the particular jobber who sold this particular bowl to the store.

The testimony of both the plaintiff's and defendant's experts is that this glass could break from defects such as a scratch, a chip, a crack, or some internal defect resulting from a bump or shock. The supervisor of the testing department of the defend-

ant testified that a deep scratch might not affect the durability of a dish, whereas a slight scratch might cause it to break. If this be so, it is in the realm of possibility that in the casual visible inspection made by plaintiff and her husband of the dish after they brought it home they may have overlooked some apparently slight defect, which subsequently caused the break. When they received the dish from the store it was wrapped. They bought it from a sample and did not examine it until they reached home.

The plaintiff claims that as she was holding the bowl in her left hand wiping the inside of it with her right hand it exploded with a loud crashing noise. She then noticed that her right wrist had been severely cut. At the time of the mishap she was standing by the sink near the title drains on the side thereof, which were approximately three feet from the floor. According to the police officer who visited the scene shortly after the accident, several fragments of glass were on the drainboard and in the sink, together with some powdered glass and two or three small fragments on the floor two or three feet from the sink. All these fragments he collected and placed in a box or container of some sort. Plaintiff's husband testified that later he found some small fragments under the stove, back of the radio to the left of the left drainboard, and under the dining room rug, near the door to the kitchen, which was a small room approximately eight by ten feet. These fragments were also placed by plaintiff's husband with the other fragments

and subsequently thrown away. They were never seen or examined by any of the experts in the case, and the defendant had no opportunity to examine them. Thus the reason for the breaking is left to speculation and expert testimony.

Plaintiff also claimed she received a slight cut or abrasion upon her face from a small fragment of glass. There is no doubt she had such a cut or abrasion.

Plaintiff's expert, assuming that there were no externally caused defects, and that the breaking occurred because of internal strain caused by faulty or inadequate annealing, testified that faulty annealed glass will shatter with a crackling sound. Defendant's experts testified that annealed glass may break but it will not shatter; that tempered glass shatters, but annealed glass does not; that if glass shatters, it shatters into small pieces only, and not into large as well as small fragments; and that if the accident occurred as plaintiff claims it did, it was due to a surface defect and not to a strain caused by faulty annealing. They further testified that in their experience Pyrex ware had never exploded as plaintiff claims.

Legal Conclusions

Plaintiff's counsel contends that under the doctrine of res ipsa loquitur she is entitled to recover because she has shown that the breaking occurred through faulty annealing, and that defendant has failed to show proper care upon its part in the manufacture and inspection of its product.

As a primary consideration for this doctrine to be applicable to a case of this kind, all other causes than defendant's negligence must be excluded. In other words, that doctrine can only be applied where the nature of the accident not only supports the inference of defendant's negligence, but excludes all others.

Hubert v. Aztec Brewing Co.,
26 Cal. App. (2d) 664, 688.

It is sometimes said that this doctrine does not apply if the particular product involved in reaching the consumer from the manufacturer has passed through other hands.

Gerber v. Faber,
54 Cal. App. (2d) 674.

This statement may or may not go too far, but it is clear that the burden of proof to show careful handling and to exclude any inference of any other cause or causes is upon the plaintiff. Zentz v. Coca Cola, 92 A.C.A. 140. It is difficult to find that plaintiff has sustained this burden of proof. In the many handlings of this article from manufacturer to consumer there is no evidence of how carefully it was done. There is no evidence that the article did not in such transit receive a bump, shock or slight crack or scratch, which weakened it and subsequently led to the breaking. The plaintiff says she saw no defect in it when she first looked at it after she had purchased it, and brought it home, but as heretofore pointed out, she, without experience, may have overlooked any such defect. It is not an

uncommon experience to have a cup, saucer or glass, which appears perfectly sound, break in one's hands. At what particular moment the weakness or defect appeared is purely a matter of conjecture.

It may be argued that the bowl "exploded" and that this indicates clearly that the defect occurred in manufacturing. The weight of the evidence is that annealed glass does not explode or shatter. It shows that tempered glass shatters into small fragments, but that annealed glass does not. The physical evidence here shows this bowl broke into large and small fragments, which is not a shattering or disintegration. Assuming the small fragments were widely scattered, as plaintiff's husband says, and that one of them struck her in the face, this is not inconsistent with the fact that what really happened was that when the bowl broke in plaintiff's hand the part which she did not have in her grasp fell into the sink and upon the tiled drain, causing it to break in large and small fragments and scattering the fragments, particularly the smaller ones, some distance from the place where the glass struck the sink or title, as is usual with any glass article broken by such a fall. In fact, if this were what happened, as the tile drain was only a short distance from plaintiff's face, it is within the range of possibility that one of these fragments may have been hurled upward and thus struck, plaintiff's face.

The foregoing considerations, and several others, indicate, in my opinion, that the evidence does not exclude every reasonable inference that the break-

ing was due to causes other than a defect in the manufacturing of the article.

But, even if it be assumed that there was a defect in the Pyrex bowl at the time it left the hands of the defendant at the factory, and that it was this defect which caused the injury suffered by plaintiff, a defect in manufacture does not necessarily mean negligence either in manufacture or in inspection of the finished article by the manufacturer. This Court is still faced with the question of whether the defendant was in fact negligent either in the manufacture of the article or in its failure to discover the defect through a reasonable inspection.

It is the contention of plaintiff that the doctrine of res ipsa loquitur is applicable in this case, and that under this doctrine the evidence presented by plaintiff requires a finding by this Court of negligence on the part of defendant. Defendant, on the other hand, contends that it was not negligent, since the process of manufacture and the method of inspection carried out at the factory was reasonable under the circumstances.

At the outset it should be noted that, contrary to plaintiff's contentions, this Court, in denying the defendant's motion for a nonsuit, did not rule that this was a proper case for the doctrine of res ipsa loquitur. That ruling merely determined that plaintiff had introduced sufficient evidence of the accident and of various means of inspection by which the defect in manufacture, if one existed, might have been discovered, so as to allow the Court to draw an inference, for purposes of that motion, that there

was a prima facie case of negligence. The net result of that ruling was to place the defendant under a burden of going ahead with evidence to negate this permissible inference of negligence.

At the present stage of the case the duty of this Court is equivalent to that of a jury—to make a finding of fact as to whether defendant was negligent. In effect plaintiff asks the Court to rule that the doctrine of res ipsa loquitur applied to this case requires a verdict of negligence, or at the very least that the doctrine results in shifting the burden of proving lack of negligence over to defendant. It is my opinion that neither of these conclusions are required by the law or the facts, although it must be admitted there is some disagreement as to the exact effect of the res ipsa loquitur doctrine in California.

See Prosser, Res Ipsa Loquitur in California, 37 Cal. Law Rev. 183, 218.

As pointed out by Dean Prosser in this article—"a res ipsa loquitur case is merely one kind of circumstantial evidence case. The Latin tag adds nothing to the proof which would exist without it. Such proof cannot be reduced to a formula or a rule, and its strength, weight and force will depend always on the inference reasonable men may draw from the particular facts. A res ipsa loquitur case may be strong, or it may be weak. There is no typical case and there is no more reason to expect that two cases will be alike than in other cases of circumstantial evidence." Prosser, ibid. p. 232. In other words, each case must be examined on its own merits. De-

cisions should depend not upon the label that might be attached to a particular situation, but upon the specific facts or circumstances of the specific case.

When we examine the facts of the instant case, we are confronted with a further difficulty which negates any otherwise controlling effect of the res ipsa loquitur doctrine. It is generally agreed that a res ipsa case arises only where "there is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not ordinarily occur unless someone has been negligent." Prosser, ibid. p. 233. I am very doubtful that there is any common experience or any evidence introduced in this case that this type of accident is one that ordinarily occurs only if someone was negligent. The distinction between this case and those generally cited, e. g. the toe in the chewing tobacco and the vagrant steamroller, seems clear. The only evidence presented was that the alleged defect could probably have been discovered through the use of a polariscope. To conclude therefrom, without further evidence or common experience, that since this defect was discovered, it would not have occurred unless the defendant were negligent, would be to convert the defendant manufacturer into an insurer, and to decide the case by means of a grammatical syllogism rather than on the basis of the evidence presented.

The cases relied upon by plaintiff do not support such an extreme position. The case of Hoenig v. Central Stamping Co., 6 N. E. (2d) 415, involved

an appeal from a judgment of the trial court in favor of plaintiff. Such a judgment could be overturned only if it were held that the defendant was entitled to a directed verdict or a dismissal of the complaint. The dissenting opinion, on appeal, thought he was so entitled as a matter of law. The majority opinion, however, held that the plaintiff had presented a case sufficient to go to the jury. In the instant case, this Court has already decided this issue in favor of plaintiff. However, the determination of such an issue is of no help in deciding the factual question of whether defendant was negligent as a matter of fact. The Hoenig case would support a judgment for the plaintiff, but does not require it.

The same issue was before the court in McClellan v. Acme Brewing Co., 92 A.C.A. 814, i.e. whether the plaintiff was entitled to have the case go to the trier of fact. Such issue is not before the court at this time.

Dierman v. Providence Hospital, 31 C. (2d) 290, is an extreme situation, and offers little guide to this Court. Although the exact basis for the decision is somewhat confusing and the quotation from the case of Bourquignon v. Peninsular Ry. Co., 41 Cal. App. 689, 694, seems unfortunately broad, the result is sound, based upon the proposition that the original inference of negligence from the fact of the explosion is treated as compelling in the absence of sufficient rebutting evidence. In that case the defendant failed to introduce evidence showing care on the part of defendant in handling the equipment

or inspecting it before the accident occurred, or thereafter, to determine the cause of the accident.

In short, we are still left with the factual problem of determining whether or not the defendant was negligent under the circumstances of this case. Statements by other courts as to how and why they have applied the res ipsa loquitur doctrine in other cases offer pitfalls rather than shortcuts.

There can be no quarrel with the general proposition that if the defective condition was reasonably certain to put life and limb in peril and could have been disclosed by reasonable inspection and tests, it is negligence to omit such tests. O'Rourke v. Day and Night Water Heater Co., 31 C.A. (2d) 364; Sheward v. Virtue, 20 C. (2d) 410. In other words, the duty of care requires an inspection in such a situation. The plaintiff here contends that reasonable and adequate are synonymous in such a case, and that if the inspection does not disclose the defect it is necessarily unreasonable. Such is not the law. What is reasonable is determined by weighing the magnitude of the risk of harm against the utility of the actor's conduct. No man can be expected to guard against events which are not reasonably to be expected or are so unlikely that the risk would commonly be disregarded. "The idea of risk necessarily involves a recognizable danger, based upon knowledge of the facts and a reasonable belief that harm may follow . . . The culpability of the actor's conduct must be judged in the light of the possibilities apparent to him at the time, and not by looking backward 'with the wisdom born of the

event.' " Prosser on Torts 220. In short, it is of the essence of actionable negligence that the party charged should have knowledge that the act complained of was such an act of commission or omission as might within the domain of probability cause some such injury as that complained of. In other words, the danger of injury must be reasonably foreseeable. Pittsburgh SS. Co. v. Palo, 64 F. (2d) 198. The cases cited by the plaintiff are in accord.

In the light of these fundamental tort rules can it be said that defendant's failure to inspect with a polariscope every piece of Pydex ware produced in its factory was negligence on its part? If plaintiff had introduced evidence of a past history of accidents or of numerous complaints by customers of shattering or exploding of defendant's ware we would have a different situation. If such were the case, it would be reasonable to hold that defendant was on notice of a risk requiring far greater care in inspection than was its practice; failure to inspect each article by means of a polariscope under such circumstances might well be considered negligence. No such evidence or proof was introduced by plaintiff, although if such were the case it could certainly have been discovered through the discovery processes available to plaintiff.

In the light of the evidence in this case it cannot be said that the common experience of the manufacturer and others in this line of business forms a basis for an inference that if there were a defect it was reasonably certain to put life or limb in peril, or that the accident is of the kind that does not occur

unless some one is negligent. These bowls were produced at the rate of twenty-five pieces per minute. The jobber who testified stated that he alone handled fifteen to twenty carloads of this commodity a year, and there were other jobbers beside him who supplied the Emporium-Capwell Company with these goods. There is no evidence in the record that the breaking of this ware ever hurt or injured any one before. None of its ingredients has any explosive properties. While glass is brittle and will break it is regarded as inherently non-dangerous. The piece involved in this case was simply an open bowl which even if defective and susceptible of breaking would not ordinarily in the nature of things injure or hurt the person handling it.

The question of reasonable care is to be examined in the light of all these considerations. If this article were one which was to be filled with charged water or other liquid, or if it were a chair which if it broke might cause an injury, the degree of care constituting reasonable care involved in the manufacture thereof would, of course, be greater, because a defect in either bottle or chair would be reasonably certain to cause serious harm.

Since, under the circumstances of this case, there was not such reasonable certainty, and since it was shown that during the course of the manufacture of this kind of ware at defendant's plant specimens of each batch were given a thermal test, an abrasion test, a dropping test, a polariscope, and several similar inspection tests, and that such manufacturing was done under a controlled process, so that

these tests would speak for all the ware in the batch so tested, to hold defendant liable in this case would be tantamount in my opinion to making a manufacturer an insurer of his product.

To support her claim of failure to use reasonable care on the part of defendant, plaintiff finally relies upon the case of Smith v. Peerless Glass Co., 181 N. E. 576, contending that the court therein held that inspecting only one out of each 480 bottles under the polariscope constitutes negligence. Plaintiff has misconstrued the holding of the Peerless Glass case. In its opinion in that case, the appellate court agreed that the following facts were present: (181 N. E. 576, 578).

1. The defendant-manufacturer knew that soda water bottles sometimes explode.

2. The manufacturer knew that the bottles would be apt to explode if striated (having little ridges on the surface of the glass).

3. The manufacturer tested 6 bottles out of each batch of 2880 by polariscope to check the annealing process. In the words of the court "Defendant was not called upon to subject each bottle to the infallible polariscopic examination. Under the evidence that seems to have been impracticable."

4. Defendant admitted no specific examination was made to detect striation, whereas the customary test was to put bottles first in hot water and then in cold.

Under that set of facts, judgment for the plaintiff

was upheld. The distinction between those facts and the situation confronting the Court in this action seem obvious.

The Court did not base its decision upon a theory that polariscopic inspection of one out of every 480 bottles constituted negligence. On the contrary, it followed the lower Court's finding and held that the inspection of every bottle in this manner was not practicable. However, it held that the lower Court was correct in its finding of negligence because it was shown that the defendant was aware soda water bottles would explode if striated, that the particular bottle involved was striated, and this bottle should have been given the thermal test which would have detected the weakness.

For the foregoing reasons I have decided that plaintiff is not entitled to recover, and that judgment should be for defendant and against plaintiff. Such a judgment will be entered upon defendant preparing and submitting to me the requisite findings and judgment.

Dated: September 19th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed September 19, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Herbert W. Erskine presiding, on January 24, 25, 26 and 27, 1950, W. Glenn Harmon, Esq., and William H. Henderson, Esq., of Johnson, Harmon and Henderson appearing as counsel for plaintiff, and Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman appearing as counsel for the defendant Corning Glass Works, said cause being tried by the Court sitting without a jury upon plaintiff's complaint and the answer of defendant Corning Glass Works.

Thereupon witnesses were called by the respective parties, and evidence, both oral and documentary, was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. The briefs having been filed, said cause was duly ordered submitted for decision and judgment.

Wherefore, by reason of the premises, and having duly considered the law and the evidence, and having made and filed its opinion in said cause, the Court now makes the following:

Findings of Fact

1. At all times mentioned in said complaint the plaintiff was a citizen and resident of Berkeley, California.

2. At all times mentioned in said complaint defendant Corning Glass Works was a corporation organized and existing under and by virtue of the laws of the State of New York, doing and transacting business in the State of California, and engaged in the business of manufacturing and selling a certain brand and type of glass cooking utensils, known generally as Pyrex Ware, which are distributed and sold throughout the State of California, generally; that said glass cooking utensils were designed for use by the public in general as dishes for cooking and serving foods generally, and were sold by defendant F.O.B. Corning, New York, to dealers and jobbers for ultimate resale by stores to the public for said uses.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

4. On December 18, 1948, plaintiff purchased from a local store certain Pyrex Ovenware, more particularly described as a Pyrex baking dish, which had been manufactured by defendant Corning Glass Works. Thereafter, on December 23, 1948, plaintiff washed said baking dish, and, while holding it in her left hand and wiping it with her right hand, the dish broke and fell to the floor, on the drainboard, and into the sink, breaking into numerous large as well as small fragments.

5. Plaintiff sustained an abrasion on her face, a deep laceration on her right forearm which severed the radial and ulna arteries and the ulna and median nerves. A necessary surgical operation was per-

formed. Plaintiff received an injury which is permanent and which has impaired the full use of her right wrist and arm.

6. The evidence failed to support plaintiff's allegation that Corning Glass Works was negligent and careless in the manufacture and construction of said baking dish.

7. The methods of inspection and manufacture of said baking dish by defendant Corning Glass Works were reasonable and proper under the circumstances shown by the evidence.

8. The breaking of said baking dish, as aforesaid, was not proximately caused by any negligence on the part of defendant Corning Glass Works in the manufacture and construction of said baking dish, or otherwise.

9. Prior to and at the time said baking dish was being washed by plaintiff, it was not an inherently and abnormally dangerous article.

10. Plaintiff failed to prove that said baking dish had not changed in any respect after it left the possession of defendant Corning Glass Works at its factory in Corning, New York, and prior to said baking dish breaking while being washed by plaintiff in Berkeley, California, as aforesaid.

From the foregoing findings of fact, the Court makes the following:

Conclusions of Law

1. Plaintiff is not entitled to recover damages from defendant Corning Glass Works, and shall

have and recover nothing from said defendant Corning Glass Works.

2. Plaintiff is not entitled to recover costs of suit herein.

3. Plaintiff is not entitled to any relief in the premises.

4. Plaintiff's complaint is dismissed.

5. Defendant Corning Glass Works is entitled to recover costs of suit herein from plaintiff.

Let an appropriate judgment be entered upon these findings of fact and conclusions of law.

Dated this 6th day of November, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed November 6, 1950.

In the Southern Division of the United States District Court for the Northern District of California

No. 29078

LULU J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation, et al.,

Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Herbert W. Erskine presiding, on January 24, 25, 26 and 27, 1950, W. Glenn Harmon, Esq., and William H. Henderson, Esq., of Johnson, Harmon and Henderson appearing as counsel for plaintiff, and Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman appearing as counsel for the defendant Corning Glass Works, said cause being tried by the Court sitting without a jury upon plaintiff's complaint and the answer of defendant Corning Glass Works.

Thereupon witnesses were called by the respective parties, and evidence, both oral and documentary, was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. The briefs having been filed, said cause was duly

ordered submitted for decision thereafter rendered on September 19, 1950.

Now, Therefore, by virtue of the law, and by reason of the findings of fact and conclusions of law heretofore made and filed by the above-entitled Court on November 6, 1950, It Is Ordered, Adjudged and Decreed that plaintiff shall have and recover nothing from defendant.

It Is Further Ordered, Adjudged and Decreed that plaintiff's complaint is dismissed with costs of suit to defendant taxed in the sum of $123.57.

Dated this 15th day of November, 1950.

/s/ HERBERT W. ERSKINE,
Judge of the United States
District Court.

Receipt of copy acknowledged.

Lodged November 9, 1950.

[Endorsed]: Filed November 15, 1950.

Entered in Civil Docket Nov. 16, 1950.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the court for a new trial in the above-entitled matter on the following grounds, to wit:

1. Error by the court in denying plaintiff's Motion Requesting Trial by Jury and thus depriving plaintiff of her right to a jury trial in the above

cause guaranteed by Amendment VII to the United States Constitution.

2. Discovery by the plaintiff of newly discovered evidence.

The above motion will be based upon all the papers and files in the above-entitled action and all the evidence on the trial thereof, and ground 2 thereof will be, in addition, based upon the affidavits of Virginia Loney and W. Glenn Harmon, filed herewith.

Dated: November 16, 1950.

JOHNSON, HARMON & HENDERSON,
Attorneys for Plaintiff.

Notice of Motion

To Hadsell, Sweet, Ingalls & Murman, attorneys for defendant.

[Endorsed]: Filed November 17, 1950.

[Title of District Court and Cause.]

NOTICE

To Messrs. Johnson, Harmon, Stirrat & Henderson, 703 Market Street, San Francisco 3, California.
Sidney P. Murman, Esq., 405 Montgomery Street, San Francisco 4, California.

You Are Hereby Notified that on February 26,

1951, Judge Herbert W. Erskine Ordered that, due to his illness, this case now on the calendar March 8, 1951, for hearing on Plaintiff's Motion for New Trial be and the same is hereby continued to March 22, 1951, for hearing.

February 26, 1951.

C. W. CALBREATH,
Clerk, U. S. District Court.

[Title of District Court and Cause.]

NOTICE

To Messrs Johnson, Harmon, Stirrat & Henderson, 703 Market Street, San Francisco 3, California.
Sidney P. Murman, Esquire, 405 Montgomery Street, San Francisco 4, California.

You Are Hereby Notified that on March 7, 1951, Judge Herbert W. Erskine Ordered, upon stipulation of counsel, that this case now on the calendar March 22, 1951, for argument on Plaintiff's Motion for New Trial be continued to March 29, 1951, for argument on said motion.

San Francisco, California. March 7, 1951.

C. W. CALBREATH,
Clerk, U. S. District Court.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 19th day of March, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

This case came on regularly this day for hearing on motion for new trial. It is Ordered that all cases, except submitted cases, on Judge Herbert W. Erskine's calendar be transferred to Judge Roche's calendar on the respective dates.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 29th day of March, in the year

of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case came on regularly this day for hearing on motion for new trial; William H. Henderson, Esq., appearing for and on behalf of the plaintiff and moving party, and Sidney Murman, Esq., appearing for and on behalf of the defendant. After arguments by respective counsel, it is Ordered that said motion stand submitted.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 20th day of April, in the year of our Lord one thousand nine hundred and fifty-one.

Present: The Honorable Michael J. Roche,
District Judge.

[Title of Cause.]

This case having come on regularly this day for hearing on motion for new trial, and the same having been argued and submitted to the Court for consideration and decision, and now being duly considered, it is Ordered that said motion be and the same is hereby denied, as per the order this day signed and filed.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The plaintiff's motion for a new trial of the above-entitled cause having been heretofore submitted and being now fully considered upon all the files and record in said cause, it is by the Court

Ordered that said motion for a new trial be and the same hereby is denied.

Dated: April 20th, 1951.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that plaintiff Lula J. Wilson hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 16, 1950, and from the order after final judgment entered April 20, 1951, denying plaintiff's motion for new trial.

Dated: May 4, 1951.

JOHNSON, HARMON & HENDERSON,

By /s/ ROBERT H. JOHNSON,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed May 4, 1951.

In the Southern Division of the United States District Court for the Northern District of California

No. 29708

LULU J. WILSON,

Plaintiff,

vs.

CORNING GLASS WORKS, a Corporation,

Defendant.

Before: Hon. Michael J. Roche, Judge.

REPORTER'S TRANSCRIPT

Monday, October 3, 1949

Appearances:

For the Plaintiff:

JOHNSON, HARMON & HENDERSON,
By J. EDWARD JOHNSON, ESQ.

For the Defendant:

HADSELL, SWEET, INGALLS & MURMAN, by
RICHARD S. BISHOP, ESQ.

The Clerk: Wilson v. Corning Glass Works.

Mr. Bishop: Ready for the defendant.

Mr. Johnson: Ready for the plaintiff, Your Honor.

In this matter plaintiff neglected to ask for a jury. It is a case that is entitled to a jury and

the request was made. An affidavit has been filed showing it was inadvertence and mistake that the jury was not demanded in accordance with the rules, and we now ask the Court to exercise its discretion to allow a jury in this case. It is a pure law case for damages where a jury would ordinarily lie as a matter of right if it had been asked for in time. We refer to Rule 39 giving the Court this discretion.

Mr. Bishop: Your Honor, I represent the defendant. We feel that the right to trial by jury has been waived in this action by failure to file it within ten days after the answer was filed.

We feel that it would be better to try this case before the Court for this reason: The action is against the Corning Glass Works, manufacturers of Pyrex ovenware, and the plaintiff claims that a baking ware manufactured by this defendant shattered or exploded in her hands and brings an action for personal injury. There will be much technical testimony as to the mode of manufacture and also as to the properties of this type of glass, and we feel that this type of action can better be decided by the Court.

In addition to that, I have a memorandum here citing a case which holds that ignorance of the provisions of the Federal Rules applicable to this type of situation is not excusable neglect or inadvertence such as would entitle the plaintiff to have this motion for a jury trial granted at this time. The affidavit of the plaintiff states that plaintiff's attorney was ignorant or not advised of the rule

applicable. We feel that under this case no excusable neglect or inadvertence has been proved.

Mr. Johnson: I want to correct counsel. There is no statement of ignorance or not being advised; it is merely an inadvertence.

This case started in the State Courts and steps were taken to bring it here. A motion to remand it was made, and while that motion was pending an answer was filed. It was assumed by all of us in our office that it would go back to the other court and in connection with all that, the thing got overlooked and slipped by, not that we were ignorant of the rule or not advised.

Mr. Bishop: I have a case here, your Honor, in which the plaintiff sought to move for a jury trial simply on the ground that he was not familiar with the relevant provision of the new rules. I think that this case would govern the situation we have here. The Court said that——

The Court: Is this a Supreme Court citation?

Mr. Bishop: No, it is not, your Honor; it is the District Court in Connecticut. I do not claim it is binding on this Court, but I think it would have some indication of the attitude that would be proper for the Court to take on this motion.

Mr. Johnson: On the affidavit and under the cases and taking all the circumstances into consideration, they hold that inadvertence or mistake is a ground for allowing a jury trial. We have cited a case that uses that language, expresses that. If this was a complicated case that may be involved principles of equity or an accounting or something that

would be complicated for the jury, that would be a different case; but it is a pure law case; there are no contradictions in it.

The Court: We have a peculiar situation here. We have to consider the practicality of these things. We have been promised two additional judges here and they seem to be slow in coming—some political difficulties, as I understand it. That is entirely rumor, however. But if this case waits for a jury trial, you will have to wait for some time, gentlemen.

Mr. Johnson: The plaintiff expects it, and in justice to her we would have to wait them.

Mr. Bishop: We would prefer to have the Court try it, which would not consume as much time; it would dispose of the matter more expeditiously.

The Court: I was thinking that myself; but I don't recall of any case that has been presented to me, if they were acting in good faith, in which I have denied them a jury trial. However, I wouldn't want to establish that as a precedent; but it does seem to me that under the circumstances here, if either or both of you are anxious to go to trial, how you could be accommodated to call a jury in and add to our work. I don't feel justified in doing it.

Mr. Bishop: That would be in accordance with the wishes of the defendant, your Honor. We would prefer to have the case tried by the Court.

Mr. Johnson: Well, that would be an injustice to the plaintiff. She expects a jury and we have advised her of the fact it would be a jury case. So we would not be representing the plaintiff properly

if we did not present this motion to your Honor fully.

The Court: I haven't had an opportunity to check the cases. At times I disappoint everybody because I do not get legalistic enough.

I will check the cases. I will put it over a week. I will give you a final determination one week from today.

[Endorsed]: Filed April 20, 1951.

[Title of District Court and Cause.]

PROCEEDINGS ON MOTION FOR JURY TRIAL

October 10, 1949

For the Plaintiff:
J. Edward Johnson, Esq.

For the Defendants:
Richard Bishop, Esq.

The Clerk: Wilson vs. Corning Glass Works. Motion for jury trial.

Mr. Johnson: Your Honor heard our discussion a week ago. Since then counsel for the defendants, who are opposing the request for jury trial, filed an additional memorandum of points and authorities citing the case of Krussman vs. Omaha Woodman Life Insurance Company from an Idaho Court, and we have answered that, taking the view that it is not in point at all. In that case no affidavit was filed at all to show any extenuating circumstances and the Court dismissed because there was

no record and there was no showing. It had not been asked for in time, and under those circumstances was not within the rules. We filed an answer in which we cited the case of Hargreaves vs. Roxy Theater, Inc., a New York Federal Court case, which we think is very much in point. We think the facts are very much like our own. They are, as in our case, the last filings of the pleadings, was in August, as in our case, and there also in September the motion was made, which is our case also, and it was a case for damages. The Court in part said:

> "The fact that Rule 6 (B) (2) permits the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect, further indicates that in the adoption and promulgation of the new rules, the Supreme Court intended that the rigid provisions of Rule 38 (B) might be relaxed upon a proper showing, in the discretion of the Court, and it appears to be the intent and the practice to construe the provisions of the rules to render substantial justice. Civil actions to recover damages for alleged negligence are invaribly tried by the Court to a jury."

There, as in our case, it is a question of whether glass was negligently manufactured causing injury to the plaintiff. The Court goes on to say:

> "It does not appear that the defendant has suffered, or will suffer any prejudice or the loss of any substantive right and the Court should

not be too prone to deprive a litigant of a trial by jury because of an error or omission on the part of the agent of her attorney to whom she has entrusted her case; where the act or omission is excusable."

In that case the attorney told somebody to have it set and he discovered that that had not been done. In our case the mix-up came up in starting out in the State Court and then coming over here on a motion to remand, and it got overlooked. That is set out in the affidavit.

Mr. Bishop: Your Honor, the case on which counsel relies I believe is clearly distinguishable from the situation that we have here. The case on which counsel relies is a case in which the attorney for the plaintiff instructed someone in his office to prepare and handle the making of a demand for jury trial, and whoever was told in the office to do that, neglected to do so, and the Court felt that the client and the attorney should not be penalized for the neglect of someone in the office where they had been told by the attorney to do so. In the present case we do not think we have any neglect that can be called excusable. I never heard a clear statement of just what the reason for the plaintiff's failure to file this jury demand was, but I assume they simply neglected to do it or just overlooked it. The case I cited, the Krussman case, is closer to it in our point of view than the case which the plaintiff's attorney has cited. In that case, which is cited in my memorandum on file there was no affidavit filed. Plaintiff simply filed a motion for a jury trial, stating in his

motion that the reason for not making a demand for a jury trial was simply the matter had been overlooked. So that reason was before the Court. I think in the present case, since the affidavit on file has shown no excusable neglect, the Court has before it the same situation, the same position as in the Krussman case, on which I am relying. In other words, we had the neglect of the plaintiff's counsel and we have nothing more. We have nothing to show that it is excusable neglect. There is a very short paragraph which I will read to the Court from the Krussman vs. Omaha Woodman Life Insurance case. It says this:

> "The Courts who have interpreted the rule where the discretion was exercised and motion for trial by jury was granted after the time to demand it had elapsed seem to be based upon a showing made disclosing some circumstances other than the bare oversight of counsel."

In our case we claim there is nothing here except the bare oversight of counsel. No circumstances are shown which make that oversight excusable. We feel that there is no point in having these rules if the attorney simply, when he has not followed the rule, can come into Court and get the Court to decide that he can have a jury anyway. We believe it tends to encourage laxity among the counsel if they know they do not have to follow these rules, that they can simply come into Court and ask for relief. The reason we are opposing this motion is we feel it would be much better if this case were tried before the Court. There are going to be a lot

of technical questions as to the properties of this Pyrex glass. There is going to be testimony as to the manner of its manufacture. We feel it would be difficult for a jury to understand those things. We think a Judge would be in a better position to evaluate such testimony and decide whether or not the defendant was really negligent. For that reason we urge the plaintiff's motion to be denied and the case be tried by the Court rather than by a jury.

Mr. Johnson: We submit, your Honor, counsel has submitted nothing to show that the other side has been prejudiced in any manner whatsoever by this oversight and neglect on the part of plaintiff. There is no affidavit countermanding the affidavit on record, and there is no showing that any substantive right has been affected or will be affected. We submit this is a clear case where the Court should exercise its discretion to allow the jury trial.

The Court: Is the matter submitted?

Mr. Johnson: Yes, your Honor.

The Court: The motion will have to be denied on the record. Now, do you want to set it down for trial?

Mr. Johnson: Yes, your Honor.

Mr. Bishop: Yes, your Honor. We were discussing the matter and we both agreed a date around the middle of January would be satisfactory to both sides.

Mr. Johnson: Somewhere along the middle of the month.

The Court: The 24th of January.

[Endorsed]: Filed December 13, 1950.

PROCEEDINGS

Tuesday, January 24, 1950

Appearances:

For the Plaintiffs:

W. G. HARMON, ESQ., and
W. H. HENDERSON, ESQ.

For the Defendants:

SIDNEY P. MURMAN, ESQ.

The Clerk: Wilson versus Corning Glass Works, for trial.

Mr. Harmon: Ready.

Mr. Murman: Ready.

The Court: In the case of Wilson against Corning Glass Works, if you gentlemen will wait here a little while, we may have a court available this morning: If not, it will be tomorrow at the latest. Just wait for a little bit.

(Several other matters were called, then the following occurred in the instant case.)

The Court: In the case of Wilson against the Corning Glass Works, counsel are here?

Mr. Murman: Yes, your Honor.

The Court: If counsel and witnesses will go to Judge Erskine's court, across the hall, he will try the case.

(Counsel and witnesses thereupon left the courtroom.)

Proceedings had before Honorable Herbert W. Erskine, Judge of the Federal Court, commencing

at the hour of 10:00 o'clock a.m. Appearances as shown on Page 70 of this transcript.

The Clerk: Wilson vs. Corning Glass Works, for trial.

Mr. Harmon: Ready.

Mr. Murman: If the Court please, I have subpoenaed some records from the Herrick Memorial Hospital. The Custodian is here and the records, I think, should be marked for identification. You don't wish any testimony from the custodian, do you?

Mr. Harmon: Not exactly.

Mr. Murman: She is in a hurry to get back to the hospital.

The Court: All right.

Mr. Murman: These are the records you have produced on our subpoena?

The Custodian: Yes.

Mr. Murman: I will ask these records referring to Lula Wilson, produced on subpoena by Herrick Memorial Hospital custodian, be marked Defendant's Exhibit "A" for identification.

The Custodian: May I have a stipulation they will be returned?

Mr. Murman: I think the clerk will give you a receipt.

The Clerk: You can pick them up from the clerk's office, Room 355.

(Thereupon, records referred to were marked Defendant's Exhibit "A," for identification.)

Mr. Harmon: If the Court please, I will make

an opening statement at this time. This is an action for personal injuries against the manufacturer, your Honor, of a piece of Pyrex baking ware which shattered or exploded in the hands of the plaintiff in use in her household.

The plaintiff, Mrs. Lula J. Wilson, is a married woman, a schoolteacher; and about the 18th of December, 1948, I think it was, she went to the Emporium here in San Francisco with her husband, and there purchased a piece of Pyrex baking ware, a dish designed to bake food in an oven. It was taken home by her and put away for a few days, and then the evening before the accident happened it was washed by her and filled with some food—I think it was prunes—and put in the icebox overnight.

Next morning it was taken out of the icebox and some of the prunes were emptied out, and placed back in the refrigerator. Later on in the day it was again taken out of the refrigerator and the prunes were emptied out and the dish left on the sink to await washing and putting away.

The plaintiff finished her lunch, and then the few dishes that she had were piled in the sink and she proceeded to wash these dishes.

The next to the last piece was the lid of this Pyrex bowl, which was a pie plate lid, which was washed and put away; and the next she picked up the dish part of the dish itself and held it in her left-hand. It had been full of water. To begin with it was cold water, and as she washed the dishes the running water from the tap, it wasn't extremely hot, however, but comfortable to the hand.

She proceeded to wipe this dish with her right hand with a wet cloth from the water, and it then exploded or shattered with a noise, and she felt something warm on her face, thought her face was cut. First thing she discovered her right hand was cut and badly bleeding, the blood just gushing out. The dish was exploded into many pieces.

She couldn't stop the blood flow. She got the help of a neighbor and in due time they got an ambulance and she was taken to the hospital. Her hand was almost cut off. It severed both the main tendons and the main artery in her hand. She has been horribly mutilated in that hand and its use rendered very much less than what it would be ordinarily.

She seeks to recover damages for her pain and suffering and for the permanent injury which she has suffered, upon the theory of res ipsa loquitor, against the manufacturer of that glass dish.

We will show in our evidence here that the dish was manufactured by the defendant, Corning Glass Works, and that its condition had not been—that it hadn't been subjected to extraneous, harmful effects since it left the factory; and that it exploded while it was being carefully handled in a normal home use for the purpose for which it was designed; and that she has suffered very severely in pain and suffering, and still is subject to pain, and her hand is by no means fully recovered.

We shall ask for damages in the sum of $100,000.00, plus the special damages.

Certain facts are admitted in the pleadings. The defendant's corporate existence is admitted, and the

fact that it is the manufacturer of Pyrex ovenware designed for household use; and that it is engaged in the manufacture of this brand of Pyrex ware, cooking utensils, here in the State of California. It is distributed generally here.

That in brief, your Honor, are the facts upon which we will ask for a judgment against the defendants in this case.

Mr. Murman: I will make a brief statement for your Honor.

All the allegations of the complaint which allege the explosion of the dish and the negligent manufacture of the dish so that it would be caused to explode are denied, of course, by the defendant. The defendant admits that it is a corporation, doing business in California, engaged in the business of manufacturing and selling clear cooking utensils known generally as Pyrex ware, sold and distributed generally throughout California.

Now, your Honor, we expect the evidence to show that this dish could not have exploded. Counsel apparently, in the allegations alleged in the complaint and in his present statement, is endeavoring to bring the case within the so-called "exploding bottle" cases, of which there have been a great many, particularly as to Coca Cola. However, in all of those cases there is still a requirement, which I understand plaintiff says she will prove, that it must be shown from the time that the manufacturer relinquished possession nothing occurred between that time and the time that the accident occurred to

in any way change the condition of the particular utensil or article up to the claimed exploding.

That is a burden the plaintiff has. The defendant does not have the burden of not showing that, even under the exploding bottle cases. The only place where the res ipsa loquitor rule has applied in the exploding bottle cases is in a case where the plaintiff has shown that from the time the article left the manufacturer's possession and until the accident occurred, nothing occurred in the interim to change its condition in any way.

In other words, there must be proof of safe handling, and no showing of bumping or dropping which of course, as they claim, would change its condition.

Our position briefly, then, is that we are not responsible for what the complaint alleges occurred; that it is physically impossible for a piece of glass to explode; that there is no evidence that the glass was properly handled between the time it left the possession of the defendant at Corning, New York, and the time the Emporium sold it to the plaintiff in San Francisco here; that the defendant relinquished possession in New York. There was an FOB sale in New York, and it had no further possession of it after it left Corning at any time or at all.

We will ask your Honor, if the facts are as we understand them to be, that the plaintiff's complaint be dismissed with costs as to the defendant.

The Court: Proceed.

Mr. Harmon: Mrs. Wilson, will you come forward and take the stand?

(Thereupon, the plaintiff, Lula J. Wilson, was sworn and testimony was adduced.)

[Endorsed] Filed June 12, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents, listed below, are the originals filed in this Court, or true copies of orders entered in this Court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties:

Petition for removal.

Copy of complaint for damages for personal injuries.

Copy of summons.

Notice of removal.

Answer of defendant Corning Glass Works.

Motion to remand.

Notice of motion to remand.

Affidavit in support of motion to remand.

Affidavit in opposition to motion to remand.

Copy of notice that case will appear on calendar to be set for trial.

Motion requesting trial by jury.

Affidavit in support of motion requesting trial by jury.

Minute order of October 10, 1949.

Minuite order of January 24, 1950, (Judge Goodman).

Minute order of January 24, 1950, (Judge Erskine).

Minute order of January 25, 1950.

Minute order of January 26, 1950.

Minute order of January 27, 1950.

Minute order of February 14, 1950.

Order for filing points and authorities.

Minute order of March 6, 1950.

Minute order of September 19, 1950.

Memorandum opinion.

Findings of fact and conclusions of law.

Judgment.

Motion for new trial.

Copy of notice of continuance of hearing motion for new trial, (February 26, 1951).

Copy of notice of continuance of hearing motion for new trial, (March 7, 1951).

Minutes of March 19, 1951.

Minutes of March 29, 1951.

Minutes of April 20, 1951.

Order denying motion for new trial.

Notice of appeal.

Appellant's statement of the points on which she intends to rely on appeal.

Cost bond on appeal.

Designation of record on appeal, (Appellant's).

Designation of additional record on appeal, (Appellee's).

Order Extending time to docket record on appeal.

Reporter's transcript, (October 3, 1949).

Reporter's transcript, (October 10, 1949).

Reporter's transcript, (January 24, 1950).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court, this 14th day of June, 1951.

C. W. CALBREATH,
Clerk,

[Seal] By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 12975. United States Court of Appeals for the Ninth Circuit. Lula J. Wilson, Appellant, vs. Corning Glass Works, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed June 14, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12975

LULA J. WILSON,

Appellant,

vs.

CORNING GLASS WORKS, a Corporation,

Appellee.

APPELLANT'S STATEMENT OF THE POINTS ON WHICH SHE INTENDS TO RELY ON APPEAL

Comes Now the appellant in the above matter and presents her statement of the points on which she intends to rely on appeal as follows, to wit:

1. The court abused its discretion in denying to appellant a jury trial.

2. The court erred denying a jury trial to appellant under Rule 38 (d) of the Federal Rules of Civil Procedure and in refusing relief pursuant to Rule 39 (b). In so far as said Rule (d) is applied so as to deny a jury trial to a litigant otherwise entitled as a matter of right to a jury merely through inadvertence or oversight for a short period of time, and not by consciously waiving said right or waiving said right by failing to claim it for such long period of time that the court and adversary are misled to their prejudice, said rule so applied to such facts is contrary to the Seventh Article of Amendment to the United States Constitution.

3. The court in denying plaintiff a jury trial violated the Seventh Amendment to the United States Constitution.

4. The court erred in refusing to grant a jury trial to appellant upon her motion for new trial.

Dated: June 18, 1951.

JOHNSON, HARMON & HENDERSON,

By /s/ JOHNSON, HARMON & HENDERSON,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 19, 1951.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

Comes Now the appellant in the above matter and designates the record which is material to the consideration of the appeal as follows, to wit:

1. The pleadings of the parties.
2. Notice of Removal of Action to the District Court of the United States for the Northern District of California, Southern Division.
3. Motion to Remand.
4. Notice of Motion to Remand.
5. Affidavit in Opposition to Motion to Remand.

6. Motion Requesting Trial by Jury.
7. Notice of Motion Requesting Trial by Jury.
8. Affidavit in Support of Motion Requesting Trial by Jury.
9. Minute Order of October 10, 1949, denying Motion Requesting Trial by Jury.
10. Findings of Fact and Conclusions of Law.
11. Judgment.
12. Motion for New Trial.
13. Minute Order of April 20, 1951, Denying Motion for New Trial.
14. Notice of Appeal.
15. Designation of Record on Appeal.
16. Appellant's Statement of the Points on Which She Intends to Rely on Appeal.

Also certificate to record.

Dated: June 18, 1951.

JOHNSON, HARMON & HENDERSON,

By /s/ ROBERT H. JOHNSON,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 19, 1951.

[Title of Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL RECORD ON APPEAL

Appellee hereby designates the additional record as material to the consideration of the appeal in the above-entitled action as follows:

1. Complaint.
2. Petition for Removal.
3. Affidavit in Support of Motion to Remand.
4. Answer.
5. Clerk's Notice of September 26, 1949, stating matter to be set for trial on October 3, 1949.
6. Transcript of oral proceedings before Judge Michael J. Roche on October 3, 1949.
7. Transcript of oral proceedings before Judge Michael J. Roche on October 10, 1949.
8. Transcript of oral proceedings before Presiding Judge on January 24, 1950, together with the Clerk's minutes.
9. Transcript of oral proceedings before Judge Herbert W. Erskine concerning preliminary matters and up to the testimony of the first witness to be called on January 24, 1950.
10. Clerk's minutes and minute orders for January 24-27, 1950, inclusive.
11. Order of Judge Herbert W. Erskine dated February 14, 1950.
12. Clerk's minutes and minute order of March 6, 1950.
13. Clerk's minutes and minute order of September 19, 1950.

14. Opinion of Judge Herbert W. Erskine dated September 19, 1950.

15. Clerk's notice as to hearing of motion for new trial dated February 26, 1951.

16. Clerk's notice as to hearing of motion for new trial dated March 7, 1951.

17. Clerk's minutes and minute order assigning hearing of motion for new trial to Judge Michael J. Roche, dated on or about March 19, 1951.

18. Clerk's minutes and minute order of March 24, 1951.

19. Designation of additional record on appeal filed in District Court.

20. This designation.

Dated: June 28, 1951.

HADSELL, MURMAN & BISHOP,

/s/ SYDNEY P. MURMAN,
Attorneys for Appellee.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 2, 1951.